the Commission any such authority. The effective date of the channel positioning rights of must carry noncommercial educational stations under the Act is clear and unambiguous and unqualified by any suggestion that cable operators' existing agreements to the contrary are of any effect.

Because the language of the Act is clear and unambiguous, "general principles of statutory construction" require rejection of Viacom's efforts to patch together snippets of prior pieces of legislation and prior committee reports as inappropriate and irrelevant. Viacom's efforts to find due process and First Amendment difficulties with this routine and straightforward piece of economic legislation are as strained as its claims that cable operators had no expectation whatsoever that Congress might some day restore must carry rights and that cable operators will not be able to locate suitable alternative channels for the few cable programmers who will in fact be displaced.

APTS believes the better course for the Commission would be to honor Continental's request that it "clarify" that operators should not be held contractually liable for failing to honor those contracts whose channel positioning provisions have been nullified by the Act.

V. PROCEDURAL REQUIREMENTS

A. Notification Regarding Deletion or Repositioning of Channels

There was general agreement among the cable operators that the requirement in the Act that they give noncommercial educational stations and all subscribers to the cable system written notice at least 30 days before deleting or repositioning the station was reasonable.[16/] APTS therefore reiterates its request that the FCC adopt the procedures it suggested (at pp. 36-7) for ensuring that this notification is meaningful and timely.

B. Remedies

There are a number of issues raised by the comments in connection with the FCC's complaint procedures for noncommercial stations under Section 5(j) of the Act: (1) the time within which cable systems are required to respond to complaints; (2) whether time limitations should be imposed on stations to file complaints with the FCC, and (3) rules governing the implementation of the complaint procedure.

1. Cable Operators' Response to Complaints

Cable commenters unanimously rejected the proposal in the Notice that they be afforded ten days to respond in

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16/ See TCI Comments at 24; InterMedia Comments at 21; and Tel-Com Comments at 23. The cable parties noted that this 30-day notification requirement was consistent with franchise agreements that required similar notification prior to drops and switches.

writing to a complaint of non-carriage filed with the FCC.[17/] These commenters argued that a ten-day response time was insufficient and suggested that a 30-day response requirement was more reasonable. APTS agrees. Thirty days should provide the operators with a reasonable period within which to respond without cutting short the FCC's 120-day processing time.

Commenters also proposed various time limits for additional filings with the FCC. Many cable commenters suggested that, after their 30-day response to a complaint, broadcasters be permitted a ten-day deadline for filing oppositions followed by an additional ten-day period for replies by cable operators.[18/] This builds into the pleading process an additional, unnecessary and time consuming step.

APTS advocates, as it did in its initial comments, that the following pleading cycle is sufficient: broadcaster complaint; 30-day cable response; 20-day broadcaster reply. It mirrors the complaint process provided in the federal courts,[19/] and it is consistent with the logical presentation of evidence and burden of proceeding in such a case. See Part V.B.3. below.

[17/] See Adelphia Comments at 21-22; InterMedia Comments at 22; and Tel-Com Comments at 24-25.

[18/] See InterMedia Comments at 23; Tel-Com Comments at 25.

[19/] See Fed. R. Civ. P. 7.

2. Time Limitation for Stations To Complain to the FCC

A number of cable commenters argued that a time limit should be set on broadcasters' rights to file complaints with the FCC when a cable system refuses a carriage request or drops or repositions a signal. These ranged from 30 days[20/] to 120 days[21/] from a cable system's notification of such an adverse action.

APTS, along with NAB, INTV and Malrite Communications, argued against such a time limitation and cut-off of rights. The broadcasters asserted that (a) the statute did not impose any limitation on the broadcasters' ability to file complaints under Section 5(j); (b) a time limitation would prevent those stations that are unaware of non-carriage or improper carriage from exercising their rights under the Act; (c) broadcasters notified of non-carriage have every incentive to file immediately and those that delay run the risk of weakening their cases; (d) a time limit for filing a complaint may cut off time needed for good faith negotiations with cable systems and force stations to file complaints prematurely.[22/]

[20/] See Adelphia Comments at 22; InterMedia Comments at 21; and Tel-Com Comments at 24. These commenters would require a broadcast station to file complaints with the FCC within 30 days or lose its right to file a complaint under Section 5(j).

[21/] See Time Warner Comments at 31.

[22/] See APTS Comments at 39-40; NAB Comments at 34-35; INTV Comments at 18; and Malrite Comments at 10-11.

In light of these factors, APTS strongly urges the Commission to impose no limitation on the broadcasters' ability to file a carriage or channel positioning complaint with the FCC. The Commission could state that it may consider, as an adverse factor against the broadcaster, a delay of more than 120 days in filing a complaint, where the broadcaster has adequate notice of the adverse action and does not state a good reason for a delay in filing (such as engagement in good faith negotiations with the cable system).

If the Commission determined that a time limit on filing complaints were warranted, the Commission must impose such a time limit in a way that does not cut off any station's ability to exercise its right to complain to the Commission under Section 5(j). Specifically, the Commission should:

> (1) Provide a time period of at least 120-days from the date of service of an adverse action (plus three days if service is by mail) to file a complaint as a matter of right. Any shorter time period, particularly the 30-day cut off suggested by the cable commenters, would be insufficient. The broadcasters require time to research their carriage rights under the Cable Act and determine whether the adverse action is consistent or inconsistent with the provisions of the Act; to negotiate an amicable resolution with the cable systems; and, if necessary, to prepare and file a complaint (including obtaining legal representation).
>
> (2) Permit stations to file after the 120-day time period for good cause shown. This good cause provision is necessary to ameliorate any inequitable cut-off of stations' rights to file complaints. For example, a station that can show that it did not receive notification of an adverse action should not be held to a any cut-off period for filing a complaint.

(3) Require adequate notification by the cable systems to trigger a station's requirement to file a complaint within the 120-day time period. Adequate notification depends on the context.

Denial of a carriage request: The Act does not require cable systems to respond to a noncommercial station's request for carriage. The station's right to complain is triggered merely by the station's reasonable belief that the cable system is not complying with the terms of the Act. The Commission must make clear that no time limitation for filing a complaint is triggered unless a cable system notifies a noncommercial broadcaster, in writing by certified mail, that it will not carry the station and states clearly all the reasons for non-carriage.

Notification of deletion or repositioning: The Act requires notification of deletion or repositioning under Section 5(g)(3). Procedures consistent with those advocated by APTS in its initial comments (p. 36) will provide adequate notification.

Notification to stations that are not carried and have not requested or been denied carriage: The FCC should require cable systems, that want to trigger a time limitation on such stations' rights to file a complaint, to serve, on all stations that are potentially entitled to carriage on the cable system under Section 5, a notification that contains all information necessary for the stations to determine their eligibility and to exercise their rights to be carried. This notification must include: a list of the noncommercial stations carried under the Section 5(k) notification requirement; the number of usable activated channels on the cable system; the number and location of the PEG channels; a list of the stations requesting carriage, the disposition of each request and the basis for that disposition; the location of each headend including the designated principal headend; the coordinates of the entire franchise area; and a list of noncommercial stations carried as of July 19, 1985 and March 29, 1990. Without this information a station cannot adequately determine whether it is entitled to carriage under the Act.[23/]

[23/] If a cable system fails to send such a notification to a station eligible for carriage under Section 5, that station's right to file a complaint with the FCC should not be cut off.

(4) No time limitation should apply to cut off the rights of stations that receive no notification of an adverse action. This should include situations in which: (a) a cable system fails to notify a station of an adverse action (or a station can show that it did not receive notification that was allegedly sent); (b) a station is not carried by a cable system, and has received no notification by the cable system adequate to trigger a time limitation (see 3 above); or (c) a station is unaware of an adverse action that requires no notification under the statute, such as the failure of the cable system to transmit program-related material or a good quality signal.

Without these conditions and notification procedures, the cut-off of a station's ability to exercise its statutorily conferred right to complain to the FCC would be denial of due process.

3. Procedures for Filing Complaints Under Section 5(j) of the Act

In addition to the time limit for stations to file complaints with the Commission, a number of additional complaint processing issues were raised by the comments. These include: (a) the burden proof to be applied by the Commission; and (b) the time period for implementing a Commission order.

a. Burden of Proof and Proceeding

TCI argued that, in ruling on complaints filed by broadcasters, the Commission should afford cable operators "substantial deference." Specifically, TCI argues that an operator's decision should be upheld as long as it is not "arbitrary and capricious," and that carriage and channel positioning decisions should not be reversed unless it is

shown that the "operator acted in bad faith or clearly misinterpreted governing law." TCI Comments at 25-26.

TCI's proposed standard of proof has no relevance to the Commission's responsibility to resolve disputes under Section 5 of the Cable Act. The issues that will be before the Commission will be largely factual: is a station qualified; is it local to the cable system; does a station's programming substantially duplicate the programming of another station carried? These are relatively straightforward factual issues for the Commission to resolve, particularly if the Commission, as APTS advocates, sets non-discretionary, objective guidelines for cable systems and stations to follow.

The standard should not be whether the cable system's determination on any of these issues was arbitrary or capricious or in bad faith; rather, it should simply be whether the cable system erred as a matter of fact and law. Whether a cable system errs in good or bad faith, or whether a decision is arbitrary or reasonable is irrelevant. If a carriage or channel positioning decision does not comply with the terms of the Act, it is erroneous, and should be corrected by a Commission order requiring carriage or the correct channel.

An issue closely related to the burden of proof is the appropriate burden of proceeding at each stage of the Commission's complaint process. APTS suggests that the following burden of proceeding should be adopted by the FCC.

(1) A broadcast station meets its threshold burden of proof and shifts the burden of proceeding to the cable operator if, in its complaint, it states the factual basis to show that it is: a qualified noncommercial educational station and that it is local to the cable system under Section 5. It should also state whether it is affiliated with a state network.

(2) This shifts the burden to the cable operator to raise all defenses to carriage that it may have. A cable operator states a defense to carriage if it presents competent evidence showing that the station is not entitled to carriage under Section 5. This may include, for example, evidence that:

- the station's Grade B is not within the cable system's service area;
- the station fails to deliver a good quality signal to the cable system's headend; or
- if pertinent, the station substantially duplicates the signal of another station carried.[24/]

(3) If a cable operator establishes a defense for non-carriage, this shifts the burden of proceeding back to the broadcaster, who then must present competent evidence to rebut such defenses.

The above burden of proceeding places, at each stage, the burden on the party that is uniquely in possession of the information required to make the requisite showing. For example, in the complaint stage, it would be unfair and burdensome to require broadcasters to anticipate and rebut every defense that a cable operator may raise.[25/] Rather, it

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[24/] The substantial duplication issue only arises if the station is affiliated with a state network station carried by the cable system or the cable system has a capacity of 36 or more channels.

[25/] Cable operators are currently attempting to place that burden on stations requesting carriage by refusing to respond (continued...)

is incumbent upon the cable operator to state its defenses and the factual bases for those defenses because these are within the unique purview of the cable operator.[26/]

If the Commission, at the outset, defines the burden of proof and proceeding for complaints under Section 5(j), it will encourage a more complete record after the end of the pleading cycle, and it will define the procedure for presenting evidence at any evidentiary hearing that may be necessary. This will facilitate and expedite any complaint process before the FCC.

b. Time for Implementing Commission Order

Tel-Com proposes that where the Commission orders a station to be carried on the cable system, it should provide

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[25/](...continued)
to initial carriage requests unless the station provides, for example, evidence that its Grade B is 50 miles from the cable system's principal headend, that it delivers a good quality signal to the principal headend, or that it does not substantially duplicate programming of another station carried. See Letter from Nick Slechta to Randal Bang dated December 2, 1992, attached as Attachment A. These types of requests place inappropriate burdens on stations to provide information that is uniquely within the purview of the cable operators. At the initial request or complaint stage, stations do not know the location of the principal headend, have no way of measuring whether they deliver a good quality signal to the headend, and have no basis to determine whether the duplication defense is appropriately raised because they do not know the capacity of the cable system or the other stations carried.

[26/] For example, the cable operator must identify its principal headend and the justification for that designation to rebut an allegation by the station that it is local; provide measurements (uniquely within its purview) to show that a station fails to deliver a good quality signal; or state the bases for a substantial duplication defense.

at least 90 days for the implementation of such a carriage order. Tel-Com Comments at 26.

A 90-day implementation period is excessive. APTS suggests that an implementation period of 45 days better balances a cable operator's need to have time to implement the change and the broadcaster's right to carriage under the Act as soon as reasonably possible. Forty-five days will provide cable operators ample time to notify stations or programmers that may be affected,[27/] as well as subscribers through their monthly billing statements. Tel-Com's suggestion that the Commission afford time to resolve other complaints that may be triggered by the implementation of a Commission's order is misplaced. The suggested 90-day time period would not be sufficient to resolve such complaints (the Commission enforcement action itself is 120 days). Moreover, it would be inequitable to require that all conceivable complaints be resolved before a prevailing broadcaster's right to be carried under the Act can be realized. Furthermore, cable operators have acknowledged the reasonableness of a 45-day implementation period by agreeing to that time frame in a Standstill Order adopted by the court in the litigation

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[27/] Cable operators can easily meet the 30-day notification requirement under Sections 4(b)(9) and 5(g)(3) of the Act.

challenging the constitutionality of the must carry provisions of the Act.[28/]

Respectfully submitted,

AMERICA'S PUBLIC TELEVISION STATIONS

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January 19, 1993

[28/] See Turner v. FCC, Civ. Action No. 92-2247, filed Oct. 5, 1992, D.D.C.

TCI of Kansas, Inc.

December 2, 1992

Nick Slechta
General Manager
Smokey Hills Public Television
Box 9
Bunker Hill, KS 66502-6083

Dear Nick:

I am writing in response to your recent request that we begin carrying your station on our Dodge City, Kansas cable system.

As you know, the 1992 Cable Act requires that stations meet certain requirements to be carried on a cable system. In the absence of any clarifying rules or instructions from the F.C.C., we request that you furnish us certain information to demonstrate your station's qualifications for carriage.

Please provide the following information:

1. Documentation indicating your eligibility for funding from the C.P.B, or your ownership by a municipality.

2. Evidence attesting to the fact that your station is not substantially duplicative of other educational stations in that market or cable system. (Currently, our Dodge City system carries KRMA Channel 6.)

3. We would appreciate your assistance in testing both the signal strength and quality at our headend. This is necessary to determine that the signal meets the minimum levels required by the new act. I will have our system technicians contact you directly.

We are not certain that we can accommodate your request for carriage, without compromising either your rights, or other broadcaster's rights to particular channel positions. We are expecting clarifications from the F.C.C. in it's pending rulemaking. this will help us to sort through the conflicting demands of various broadcasters for particular channel positions.

Your response to these requests may be directed to my attention at this address. I will look forward to your reply.

Sincerely,

Randal R. Bang
Vice President of Operations

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